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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 393

BENNIE LAZAROV, JACOB CARL EPSTEIN, *Petitioners*

v.

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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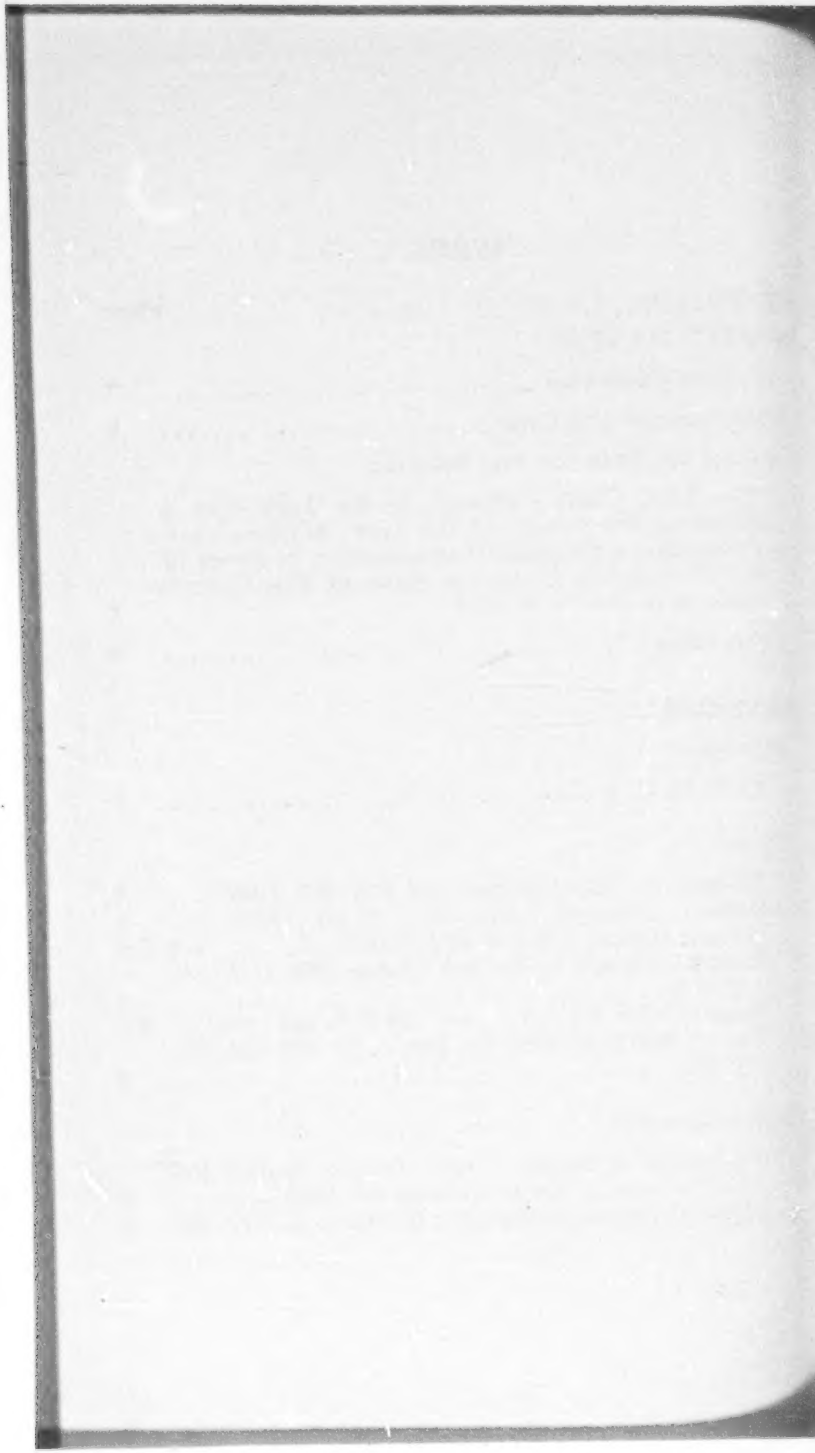
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Petitioners, Bennie Lazarov and Jacob Carl Epstein, pray that a rehearing be granted of this Court's order denying their petition for a writ of certiorari, and that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit affirming their conviction for conspiracy to defraud the United States.

QUESTION PRESENTED

Under a one count indictment charging a conspiracy to defraud the Government, the prosecution admittedly was required to prove that petitioners, one of whom purchased rope from the Government, conspired with the purpose of fraudulently impairing the Government's right to sell its property. At trial, no impairment beyond a *financial* one was claimed or proved by the prosecution, its entire proof being that there was a conspiratorial purpose to financially cheat. Petitioners submitted contrary evidence. However, the trial court (purportedly applying *Haas* v. *Henkel*, 216 U. S. 462 (1909)) charged the jury they could convict even though there was no purpose to financially cheat the Government.

In these circumstances, the question is whether the trial court, by a mistaken application of the *Haas* decision, erroneously and dangerously extended the law of conspiracy so that conviction can result from evidence of a purpose to financially cheat, but, incongruously, acquittal cannot result from evidence showing that such a purpose did not exist.

STATEMENT OF THE CASE

With the exception of that portion of the trial court's charge pertinent to this petition, the facts are adequately stated in the original petition and opposition thereto.

The trial court instructed the jury as follows (App. 199a):

> "To conspire to defraud the United States, I might explain, means primarily to conspire to cheat the Government out of property or money, but it also means to interfere with or obstruct

one of its lawful governmental functions by deceit, craft or trickery, or at least by means that are dishonest.

"It is not necessary, as I have said,[1] that the Government shall be subjected to property or pecuniary loss by fraud, but only that its legitimate official action and purpose shall be defeated by misrepresentation, chicanery, or the over-reaching of those charged with carrying out the governmental function."

REASON FOR GRANTING THE PETITION

The Trial Court's Charge to the Jury Was a Shocking Perversion of the Law of Conspiracy, Permitting a Palpable Discrimination in Favor of the Prosecution Under the Guise of This Court's Opinion in Haas v. Henkel.

The crime of conspiracy, is, of course, a formidable weapon in the prosecution's arsenal.[2] We venture to

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[1] The trial court had previously said (App. 198a):

"Where it is contended, as in this case, the Government has been defrauded through the impairment, obstruction or defeat of a lawful right, or function proof that the Government has lost in a pecuniary sense is not required, since the gist of the offense for which the defendants are on trial is that of the combination, agreement or conspiracy itself, and it is not necessary that the proof show that the Government actually lost in the pecuniary sense, or that the actual intent, design or purpose of the alleged conspirators was successfully carried out. . . ."

The tenor of the two instructions, although conceived by the trial court to be the same, are different. That quoted in the footnote deals with the problem as to when the offense is complete, while the portion recited in the text has to do with the nature of the conspiratorial purpose.

[2] See, *e.g.*, Justice Jackson's concurring opinion in *Krulewitch* v. *United States*, 336 U. S. 440, 445 (1949); *United States* v. *Falcone*, 109 F. 2d 579, 581 (2d Cir. 1940), *aff'd.*, 311 U. S. 205

say that the action of the trial court in this case, sanctioned by the court of appeals, constitutes a terrifying addition to that arsenal. Under the guise of *Haas* v. *Henkel,* 216 U. S. 462 (1909), an alarming departure from the accepted course of judicial proceedings was accomplished. That departure requires the exercise of this Court's supervisory jurisdiction by restatement and clarification of that decision.

Certain principles are axiomatic. Under the second clause of 18 U. S. C. § 371, a conspiracy to defraud the Government is punishable if the combination contemplates the fraudulent impairment of a lawful function of the Government. *Haas* v. *Henkel,* 216 U. S. 462 (1909). See also *Bridges* v. *United States,* 346 U. S. 209 (1953); *Hammerschmidt* v. *United States,* 265 U. S. 182 (1924). The contemplated impairment need not be of a financial nature if a purpose to do some other kind of hurt is proved to exist. *Haas* v. *Henkel, supra* (conspiratorial design to render inaccurate Government statistics).

Although the instruction below is, with immaterial changes, taken verbatim from *Hammerschmidt* v. *United States,* 265 U. S. at 188, the decision that must be considered here is the parent one, *Haas* v. *Henkel, supra.* It was *Haas* that first held that a conspiracy to defraud need not contemplate a financial loss to the Government. The question in *Hammerschmidt* was the more limited one whether the word "defraud" in 18 U. S. C. § 371 included a mere open defiance of governmental function. The Court, answering in the negative, distinguished *Haas* but left intact the prin-

(1940); Conference of Senior Circuit Judges, *Annual Report of the Attorney General for 1925,* pp. 5-6; Sayre, *Criminal Conspiracy,* 35 Harv. L. Rev. 393 *passim.*

ciple that a conspiratorial purpose to work a non-financial injury upon the Government through fraud was actionable.

In the present case, however, only a purpose to cause a financial impairment was claimed or sought to be proved by the Government. This Court has been so informed by the Government[3] as was the court below[4] and the trial court.[5] Concededly, therefore, for the purpose of this case, defrauding of the Government does not mean any more than cheating it out of money.

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[3] "The government's theory was that some 5,160 pounds of rope had been removed by the petitioners at the L & E [petitioner's] yard before weighing on the official scales, so that the government was not paid for this rope." Brief for the United States in Opposition, p. 3.

[4] See "Counter Statement of Facts", *passim*, in Brief on Behalf of the United States before the court of appeals.

[5] In the closing argument to the jury, the prosecution said:

> "The conspiracy, so far as defrauding the United States is concerned, was whether or not we were getting paid, or supposed to be paid—rather, supposed not to have been paid for the full amount of the rope which left the Government Fleet on those trucks. . . .
>
> "That is the lawsuit. Very simple. Just as simple as can be." (App. 147a)

The only non-financial, conspiratorial purpose remotely involved in this case is a purpose to cause a Government function to be performed corruptly by its agent. See *Glasser* v. *United States*, 315 U. S. 60 (1942). But such a purpose, in this case, is purely illusory without a design to do financial harm. The totality of the Government's proof was that it had been short-weighted and underpaid while its agent (acquitted by the jury) stood by and acquiesced. The jury was to infer the agent's corruption from his passiveness at the time of the alleged cheating. Obviously, with proof of this sort, corruption could only be incidental to the jury first believing that a purpose to do financial harm existed.

For its proof, the Government relied entirely on a showing of *actual* financial impairment as the basis for inferring the conspiratorial purpose to do the same. The petitioners contested this basic fact. Evidence was introduced of a most persuasive and disinterested kind, calculated to convince the most skeptical mind that the Government received every penny to which it was entitled.[6]

Why was the jury not convinced by petitioners' evidence? The answer is clear; the trial court, by its charge, emasculated petitioners' case and blinded the jury to the pivotal significance of this evidence. Notwithstanding that (1) *contemplated* financial loss was prerequisite to the prosecution's case and (2) *actual* money loss was its sole mode of proof, the path to conviction was left open even though the jury were to accept petitioners' evidence showing full and complete payment. Thus, the Government was permitted to make its case by the very evidence petitioners were prevented from effectively challenging. It is plain beyond argument that without actual underpayment by petitioners, the prosecution was without a scintilla of evidence to show a conspiratorial design to inflict a financial loss upon the Government.

At trial, petitioners were defending against and the prosecution urging[7] a charge of conspiracy involving only a purpose to financially cheat. But suddenly, upon the court's charge to the jury, the theory of the case

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[6] So as not to overburden this petition, reference is made to pages 2-11 of the petition for rehearing in the court of appeals, where the pertinent evidence is fully set out. This conclusive evidence also negated any possible inference of fraud.

[7] See fn. 5 *supra*.

was altered and perverted to comprehend not only a purpose to financially harm but also all other unalleged, unproved and unarticulated purposes—whatever they might be or imagined—to defraud the Government. This hydra-like transformation resulted from the pretended application of *Haas*.

Petitioners do not question the *Haas* doctrine as properly understood and applied. Where there is evidence of a design to work a non-financial injury upon the Government, the jury is quite properly told that what is important is the *injury* that is contemplated, whether or not it is financial in character. But where the entire evidence for the Government goes only to financial injury, contemplated and realized, as is admittedly the situation here, the uninformed application of *Haas* multiplies the dangers inherent in "that elastic, sprawling, and pervasive offense" of conspiracy. Concurring opinion in *Krulewitch* v. *United States,* 336 U. S. 440, 445 (1949).

Here that elasticity degenerated into amorphousness. By invoking *Haas,* a straw man is thus smuggled into the law of conspiracy, and the following dangers ensue:

1. A conspiracy to defraud may be proved by evidence of a purpose to financially cheat. But a conspiracy so proved cannot be disproved by evidence to the contrary.

2. The jury is told that belief in the prosecution's case (i.e., purpose to financially cheat) should result in conviction; that belief in the case for the defense (i.e., no purpose to financially cheat) should also result in conviction if another harmful purpose, about which there is no evidence, is found. This means little

more than, "Heads—the prosecution wins; Tails—the defense loses."

3. The jury is not told what this non-financial purpose is. Instead, they are permitted to cast about and speculate over the undefined and endless number of purposes the human mind may entertain—all without the slightest evidentiary support.

4. The presumption of innocence is subverted in respect to matters involving a purpose to do a non-financial harm to the Government. The prosecution need only establish a prima facie case of conspiracy to *financially* cheat. This energizes the *Haas* opinion, and the defense must then come forward with evidence negating every other imaginable type of purpose.

All of these dangers crystallized in the present case because of an unwarranted and palpably erroneous application of the *Haas* doctrine. That doctrine was applied below in such a manner as to discriminate in favor of the prosecution in conspiracy to defraud cases. This invidious discrimination should be stopped in its tracks by a restatement and clarification of the *Haas* case by this Court.

CONCLUSION

For the reasons mentioned above, it is respectfully submitted that this Petition for Rehearing should be granted.

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Certificate of Counsel

Sheldon E. Bernstein, one of the attorneys for petitioners, and a member of the Bar of the Supreme Court of the United States, certifies as follows:

1. That this Petition for Rehearing is presented in good faith and not for delay;

2. That this Petition for Rehearing is restricted to a substantial ground available to petitioners although not previously presented; and

3. That I have served a copy of the foregoing Petition for Rehearing upon the United States by leaving a copy thereof at the office of The Solicitor General, Department of Justice, Washington, D. C.

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